Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-967

HUGH E. BEARDEN, III, LILLIAN M. AGERS, ALBERT E. AGERS, BEVERLY CLEARY and DAVID HECKETHORN,
Appellants,

v.

HARDWARE MUTUAL CASUALTY COMPANY, a Corporation, et al.,
Appellees.

On Appeal from the Supreme Court of Missouri

MOTION TO DISMISS OR AFFIRM

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Appellees in the above entitled case move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment for the reason that: (1) The federal question sought to be reviewed was not decided by the Supreme Court of Missouri; (2) The federal question sought to be reviewed was only collaterially involved in the State Court and was not decided or determined in a manner which would properly allow it to be reviewed by this Court and (3) In any event, there is no substantial federal question involved.

The Federal Question Sought to Be Reviewed Was Not Decided by the Supreme Court of Missouri.

Examination of the record herein shows that the Missouri Supreme Court did not decide the matter below on any grounds involving the Constitution of the United States.

Appellants' Point IV raised in their briefs before the Missouri Court of Appeals, St. Louis District and considered by the Supreme Court on the transfer of the case to that Court was stated in pertinent part as follows:

> ". . . Section 303.330 of the Revised Statutes of Missouri is unconstitutional . . ."

No other statutory section was referred to either in the point or in the argument. The Supreme Court of Missouri specifically stated that it did not reach this constitutional question. In its opinion quoted in the Appellants' Appendix at Page A-4 the Court said:

> "After submission, but prior to opinion, the (Missouri Court of Appeals, St. Louis District) transferred the case to this Court on the jurisdictional basis of the constitutionality of Section 303.330 RSMo. 1969. In view of our disposition of the matter, we do not reach the constitutional question. However, jurisdiction once acquired is not lost because the appeal may be disposed of on other grounds."

The Supreme Court explained its position in a subsequent portion of its opinion set forth in Appellants' Appendix at Page A-8 where the Court said:

> "We need not, and should not, decide the constitutionality of Section 303.330 . . . We are dealing with a resuspension for failure to file proof of financial responsibility, as required by Section 301.150 (2)."

Analysis of the opinion and the Statutes referred to demonstrate that the Court was clearly correct. Section 303.330 relates to the driver's duty to return his license to the State Director of Revenue. It is Section 301.150 (2) which makes it mandatory that he keep his insurance in force in order to keep his license.

It seems clear that the Supreme Court of Missouri was not required to consider a constitutional question with regard to a Statute which was not referred to in the briefs filed before it. Rule 84.04 (d) of the Missouri Rules of Court requires that any matter being questioned be specifically raised in the "Points Relied On". The courts in Missouri like most of the courts in the country are burdened with a tremendous case load. Litigants and lawyers have been warned that the procedural rules in Missouri will be adhered to and enforced. They have been told in the plainest possible language that the Courts will not search the record for error. See particularly *Kerr v. Ehringer, Inc.*, 515 S.W. 2d 763, 765 (Mo.App.1973); see generally *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W. 2d 362 (5) (Mo.App.1973) and *Graff v. Montileone*, 523 S.W. 2d 131 (Mo.App.1975).

Under all the circumstances, the record shows that the Missouri Supreme Court specifically avoided a decision with regard to the constitutionality of the Statute and that under its long established, uniformly enforced, procedural rules it was entitled to do so. In these circumstances there is no basis for appeal. Title 28 United States Code Section 1257(2).

The Federal Question Sought to Be Reviewed Was Only Collaterally Involved in the State Court and Was Not Decided or Determined in a Manner Which Would Properly Allow It to Be Reviewed by This Court.

The instant case involves a problem which appears to be unique.

The action herein involved a question of the coverage afforded under a policy of automobile insurance. Because one of the grounds for non-coverage was based on the absence of a valid driver's license, a portion of the evidence presented in the trial court included the records of the Department of Revenue of the State of Missouri with regard to the status of that driver's license.

Those records established the original suspension of the license, the conditional return of the license to appellant Bearden III and then the automatic resuspension for failure to maintain proof of financial responsibility.

That record did not show any effort at any time by appellant Bearden or any other appellant to question the action of the Missouri Department of Revenue in any proceedings in which that agency or the State was a party. The record establishes instead that apparently the only attempt ever to question the validity of the proceedings by the State agency was in the instant case.

It is clear that the claims of invalidity constitute a collateral attack on the proceedings of the State agency involved. *Callanan Road Improvement Co. v. United States*, 345 US 507, 73 S Ct 803, 97 L Ed 1206. The law in Missouri like the law generally is that the judgments of an administrative agency may not be collaterally attacked, but may only be set aside by direct proceedings. *State v. F. W. Woolworth Co.*, 159 S.W. 2d 297 (Mo. 1942).

In a direct proceeding, the State of Missouri would be a party and would have an opportunity to present evidence, cross-examine witnesses and have a full hearing. Because the matter has been raised collaterally the State of Missouri is not a party and has not had an opportunity to participate or be heard.

All issues which might have been tried in a direct proceeding were not fully covered. There is no evidence as to proce-

dures and regulations of the State agency. The evidence presented in the instant case was confined to what the records showed with regard to the status of the driver's license.

The question now is whether the Supreme Court of the United States has jurisdiction to decide an alleged federal question not directly involved, but only collaterally raised in circumstances where the State of Missouri, a clearly interested party, is not a party to the litigation and has not had an opportunity to be heard.

We would submit that Title 28 USC 1257 cannot be logically construed as authorizing review by the Supreme Court in these circumstances and must necessarily authorize appeals only where a federal question is directly involved and where the parties to be affected by the ruling have been fully heard. It seems inconceivable that it could be raised by way of a collateral attack on the result in a separate proceeding and bind persons who are not parties.

In Any Event, There Is No Substantial Federal Question Involved.

Analysis of the record establishes that appellants have omitted important matters relating to the issue they seek to raise. So that the Court can consider the matter in context, it is necessary that the Court be alerted to the fact that there are applicable certain Missouri Statutory Sections in addition to those mentioned by appellants.

What is now Chapter 303 of the Revised Statutes of Missouri has at all times applicable included provisions for notice and hearing. Section 303.030(2) specifically provides for prior notice and hearing before suspension of the license of a Missouri citizen. As applicable in that regard it states:

". . . provided notice of such suspension shall be sent by the director to such operator and owner not less than ten days prior to the effective date of such suspension and shall state the amount required as security."

The Missouri Statutes relating to the Financial Responsibility law also provide for hearing. Section 303.290 states:

"303.290. Director's duties—regulations—judicial review

1. The director of revenue shall administer and enforce the provisions of this chapter and may make rules and regulations necessary for its administration and shall provide for hearings upon request of persons aggrieved by orders or acts of the director under the provisions of this chapter.

2. Any decision, finding or order of the director, under the provisions of this chapter, shall be subject to review by appeal to the circuit court of the county of the residence of the licensee, at the instance of any party in interest, in the manner provided by chapter 536 RSMo, at any time within thirty days after notice is given the licensee of such decision, finding or order. Upon such appeal the cause shall be heard *de novo* and the circuit court may determine the reasonableness of the director's decision, finding or order, and in disposing of the issues before it may modify, affirm, or reverse the decision, finding or order in whole or in part. Appeals from the judgment of the circuit court may be taken as in civil cases. The prosecuting attorney of the county where such appeal is taken shall appear in behalf of the director, and prosecute or defend as the case may require."

The Court will note that Section 303.290 refers to Chapter 536 of the Missouri Revised Statutes. That chapter contains the Missouri Administrative Review Act. Section 536.120 of that Act provides for suspension or stay of administrative orders. The above mentioned provisions are extremely important because they show that pre-suspension hearing is provided and that as to other administrative acts Missouri Law provides for judicial review and suspension or stay of the administrative order complained about "at any time within thirty days after notice is given the licensee . . ." of such order.

Bearden III has complained that he didn't know about the resuspension of his license. However his assertion in that regard ignores the notice given to him by this law itself and is hardly convincing on the facts. The evidence concerning the notice to him is set forth on pages 9, 10 and 11 of Respondent's Brief filed with the Missouri Court of Appeals, St. Louis District and the arguments arising from such evidence appear on page 36 of our Brief below. As pointed out in the brief Hugh Bearden III was repeatedly given notice and specific information concerning the suspension for failure to maintain his insurance in force.

First, he was put on notice by the law itself that he would be required to return his license to the Department of Revenue if he didn't maintain his insurance. Section 303.150(2) advised him that he had maintain his insurance. Section 303.330 RSMo. told him he would be required to return his license if he didn't.

Further, he was told in the original lift notice, as pointed out by the Supreme Court, of this requirement that he keep his insurance in force and he knew, from his own testimony, that he had stopped paying for the insurance and had allowed it to lapse (Bearden deposition 12, 13). If that wasn't enough, the Mission Insurance Company, the company which he had asked to file certification of its coverage with the State of Missouri, advised him of the cancellation of the insurance. (Snyder deposition, Exhibit 7).

Finally, after he had attempted to renew the license, he was, according to the records of the Safety Responsibility Unit (Abbott deposition Exhibit 12), specifically told by a letter directed

to him and dated April 17, 1967 that his license had been re-suspended and that the Safety Responsibility Unit was holding it.

Thus the record in the instant case showed not only that Bearden had notice by the terms of the law itself, but that he had been told of the consequences of a failure to maintain his insurance and he knew and had been told about the cancellation of that insurance and its effect and finally that he was told about the suspension by correspondence properly addressed.

The cases cited by appellants have involved an obviously different type of problem than the one existing in the instant case. *Bell v. Burson*, 402 US 535, dealt with the requirement of a hearing as to fault in connection with a license suspension based upon a determination as to fault. The other cases cited have also generally involved the need for a prior hearing with regard to the impairment of a property right based upon a fact issue which requires some judgmental decision or interpretation of evidence. Those cases did not involve an automatic determination directed by the law on the basis of the existence of a fact which can and necessarily must be established by documentation.

A suspension of appellant Bearden's license did not depend in the instant case on a discretionary act of a state officer based upon consideration of conflicting evidence or interpretation of evidence which might be subject to different interpretations. Rather in the instant case, Bearden under the provisions of Section 303.170 was required to have filed with the State of Missouri a certificate of insurance coverage and to maintain that insurance in force. The statute was clearly not satisfied by a "claim" by Bearden III that he might have coverage under some policy or by some other excuse, but only by the filing of the certificate.

It is clearly immaterial, therefore, that Bearden III might have claimed coverage under Appellee's policy or any other

policy. The controlling fact determining his right to keep his license was whether or not a certificate of coverage was on file with the Department of Motor Revenue. The record is clear that Mission Insurance Company cancelled his coverage and there was no certificate of coverage on file as required by the Law.

In our research, we have found no requirement in the cases dealing with due process that there be a hearing with respect to the kind of issue here involving a fact to be established by this kind of documentation. For example, so far as we have been able to determine there is no due process case decided by any court that would hold that a license cannot be revoked or cancelled for non payment of the fee required or for failure to file reports required by law. The situation in the instant case seems at least analogous to that in *Breiholz v. Pocahontas County*, 257 US 118, 42 S Ct 13, 66 L Ed 159, where the Court pointed out that a hearing is not required with regard to a matter which involves a simple calculation of taxes and a legislative direction as to the assessment to be made.

More specifically, this Court in *Mitchell v. W. T. Grant Co.*, 416 US 600, 94 S Ct 1895, 40 L Ed2d 406, has recognized that, where what is involved is simple documentary proof of a matter, then pre-hearing action can be valid at least where a method of post-action review is provided. See also *People v. Sherman*, 291 N.E.2d 865, involving the same elements. Those factors exist in the instant case. The instant case does not involve a suspension of a license without hearing based on a "fault standard". It provides a right of hearing before suspension, then for conditional return of the license and warns the licensee of the consequences of the failure to perform the condition. The resuspension involved here is automatic, as stated by the Law, on failure to perform the condition. It occurs without judgmental discussion by the agency involved which might be affected by hearing. And finally, this automatic resuspension is

based on a fact which is simple and clear involving as it does the existence of a document showing an insurance company which has certified coverage.

The record herein shows that appellants' complaints about the lack of notice to Bearden are without merit. He is not only presumed to know the law and the legal consequences of his acts and was told by the law of such consequences, but as pointed out above, he was given actual notice of such consequences.

Similarly the complaints of appellants with regard to the lack of hearing are without merit. Under the law in question, as pointed out above, there was provision for pre-suspension hearing wtih regard to the original suspension and further hearing, if requested, with regard to the automatic resuspension provided for by the law. Under *Mitchell v. W. T. Grant*, supra, the Missouri Statutory Sections in question seem clearly to have provided adequate safeguards for the rights of Appellant Bearden.

Respectfully submitted

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